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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JAMES SCHRADER; BRUCE WILSON;
LIBERTARIAN PARTY OF OHIO,

Petitioners,

versus

J. KENNETH BLACKWELL, Ohio Secretary of State, CLARK COUNTY BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WILLIAM V. STEPHENSON
Attorney for Petitioners
123 N. Summit St.
Bowling Green, OH 43402
(419) 354-9244

MARINA TRAMONTOZZI
Counsel of Record
c/o CURRY & TAYLOR
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

Curry & Taylor (202) 393-4141ussupremecourt@hotmail.com

53 pp

QUESTIONS PRESENTED

IT IS UNCONSTITUTIONAL FOR A STATE TO DENY A PARTISAN BALLOT LABEL TO THE NOMINEES OF MOST POLITICAL PARTIES WHEN THAT SAME STATE PERMITS A LABEL FOR DEMOCRATIC NOMINEES, REPUBLICAN NOMINEES, AND INDEPENDENT CANDIDATES.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINION BELOW 1
BASIS FOR JURISDICTION 1
STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 12
APPENDIX
CIRCUIT COURT OPINION 1a
DISTRICT COURT DECISION 19a
ORDER DENYING REHEARING 31a

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 US. 780,793-794 (1983).... 16
Anderson v. Martin, 375 US. 399,402 (1964) 15
Board of Education, Island Trees v. Pico, 457 US. 853,867(1982)..... 16
Cook v. Gralike, 531 US. _____(2001)..... 13, 14
First National Bank of Boston v. Belloti, 435 US. 765, 783 (1978)..... 16
Harper v. Virginia Bd. of Elections, 383 US. 663,665 (1966)..... 14
Reynolds v. Sims, 377 US. 533,535 (1964)..... 14
Richmond Newspapers, Inc. v. Virginia, 448 US. 555, 587-588 (1980) 16
Williams v. Rhodes, 393 U.S. 23,25 (1968) 15

Statutes

Ohio Revised Code Section 3505.03 16

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit dated February 23, 2001, is set forth in the Appendix, p. 11 (2001 U.S. App. Lexis ____). The Order denying rehearing en banc dated April 9, 2001, is set forth in the Appendix, p.19. The opinion of the United States District Court for the Southern district of Ohio, Western Division, dated December 14, 1999 is set forth in the Appendix,
p.20.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this court's jurisdiction is 28 U.S.C. Sections 1331 and 1343(3). The United States Court of Appeals for the Sixth Circuit issued its Decision on this case on February 23, 2001, and denied rehearing en banc on April 9, 2001. This petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Amendment I fn2 [Annotations]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV. fn6 [Annotations]

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

§ 3505.03 Office type ballot.

§ 3505.03 Office type ballot.
Text of Statute

On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the most recent primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominated by nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

The face of such ballot below the stub shall be substantially in the following form:

OFFICIAL OFFICE TYPE BALLOT

(A) To vote for a candidate record your vote in the manner provided next to the name of such candidate.

(B) If you tear, soil, deface, or erroneously mark this ballot, return it to the precinct election officers or, if you cannot return it, notify the precinct election officers, and obtain another ballot.

The order in which the offices shall be listed on the ballot shall be prescribed by, and certified to each board of elections by, the

district, and county offices the order from top to bottom shall be as follows: governor and lieutenant governor, attorney general, auditor of state, secretary of state, treasurer of state, United States senator, representative to congress, state senator, state representative, county commissioner, county auditor, prosecuting attorney, clerk of the court of common pleas, sheriff, county recorder, county treasurer, county engineer, and coroner. The offices of governor and lieutenant governor shall be printed on the ballot in a manner that requires a voter to cast one vote jointly for the candidates who have been nominated by the same political party or petition.

The names of all candidates for an office shall be arranged in a group under the title of that office, and, except for absentee ballots or when the number of candidates for a particular office is the same as the number of candidates to be elected for that office, shall be rotated from one precinct to another. On absentee ballots the names of all candidates for an office shall be arranged in a group under the title of that office and shall be so alternated that each name shall appear, insofar as may be reasonably possible, substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs, unless the number of candidates for a particular office is the same as the number of candidates to be

same as the number of candidates to be elected for that office.

The method of printing the ballots to meet the rotation requirement of this section shall be as follows: The least common multiple of the number of names in each of the several groups of candidates shall be used and the number of changes made in the printer's forms in printing such ballots shall correspond with such multiple. The board of elections shall number all precincts in regular serial sequence. In the first precinct, the names of the candidates in each group shall be listed in alphabetical order. In each succeeding precinct, the name in each group which is listed first in the preceding precinct shall be listed last and the name of each candidate shall be moved up one place. In each precinct using paper ballots, the printed ballots shall then be assembled in tablets.

Under the name of each candidate nominated at a primary election and each candidate certified by a party committee to fill a vacancy under section 3513.31 of the Revised Code shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party by which the candidate was nominated or certified.

Except as provided in this section, no words, designations, or emblems descriptive of a candidate or his political affiliation, or

candidate was nominated or certified, shall be printed under or after a candidate's name which is printed on the ballot.

STATEMENT OF THE CASE

Procedural History

On August 20, 1998, James Schrader, Bruce Wilson, and the Libertarian Party of Ohio (hereinafter "the Petitioners"), residents of the Southern District of Ohio, filed their complaint against Secretary of State Bob Taft (subsequently J Kenneth Blackwell via substitution of the parties after the Ohio gubernatorial election) and the Clark county Board of Elections, alleging that the State's discriminatory and uneven ballot access laws violated their associational rights and rights to equal protection under the First and Fourteenth Amendments, at the United States District Court for the Southern District of Ohio, Western Division.

Petitioners sought declaratory judgment, an injunction, and attorney fees. Plaintiff filed an amended complaint on September 1, 1998 seeking essentially the same remedies. Respondents submitted to Petitioners a Request for Admissions which was timely answered. On September 15, 1998, Respondents filed a motion for Summary Judgment, and on September 21, 1998, Petitioners filed a Cross-Motion for Summary Judgment. The trial court granted Petitioners' Cross-Motion for Summary Judgment on September 28, 1998, and provided declaratory and injunctive relief. Later that same day Respondents filed a motion for stay pending appeal. The trial court denied the motion on September 29, 1998 but converted the injunction to a preliminary injunction. The

converted the injunction to a preliminary injunction. The court also vacated its judgment and ordered further motions for Summary Judgment. Respondents filed their Supplemental Motion for Summary Judgment on January 25, 1999, and Petitioners filed their Supplemental Motion for Summary Judgment on March 25, 1999. Respondents filed their Reponse on March 25, 1999. The trial court again ruled in Petitioners favor on December 14, 1999, granting their Motion for Summary Judgment and providing declaratory and injunctive relief. Respondents filed their notice of appeal on January 10, 2000. The District Court's decision was reversed on February 23, 2001. Petitioners' Motion for Rehearing En Banc was denied on April 9, 2001.

The Petitioners have filed for Certiorari to this Honorable Supreme Court based upon the issue and argument presented herein.

Statement of the Facts

Petitioner James Schrader filed nominating petitions with Respondent Clark County Board of Elections containing 3,168 signatures (1, 876 were required). He was certified to appear in the November general election. Shortly before filing his petitions, Schrader was nominated, at the annual convention of the Libertarian Party of Ohio, to be its candidate for the United States House of Representatives from the Seventh District. Donald Minor ran as the Democratic candidate, and David Hobson ran as the Republican candidate (Minor and Hobson were each required to obtain only 50 signatures to be certified to appear in the election). Respondents rejected Petitioners' demand to have a partisan voting "cue" or label to appear

and Democratic candidates. Instead, Respondents affixed the label "independent" to his candidacy. Petitioners sued in Federal District Court for the right to affix a partisan voting cue or label, and won.

According to ballot access expert Richard Winger, " There were no government-printed election ballots in Ohio until 1891. The first 'Australian ballot' law in Ohio *** provided that any party, no matter its size, could place its nominees on the general election ballot with no petition However, in 1892, the system was revised, to one in which only parties which had polled 1% of the vote in the last statewide election could automatically place their nominees on the general election ballot. Other groups were required to submit a petition signed by 1% of the vote cast. They were free to choose a partisan label, so long as it didn't mimic the name of a fully-qualified political party.

In 1929 the legislature added a petition procedure by which a group could qualify itself immediately as a full-fledged political party. The full-fledged political party petition was extraordinarily difficult, as it required the signatures of 15 % of the last gubernatorial vote, due 90 days before the primary. No group ever used this 15 % procedure, even though it existed until it was held unconstitutional in 1968. In 1947 the legislature deleted the provision of the 1% petition law which provided that candidates who used this procedure, could choose a partisan label. Instead, they could only choose the label 'independent'. Senate Bill 3

In 1951 the legislature even deleted the provision of the 1% petition law which provided that candidates who use this procedure, could have the label 'independent' next to their names on the general election ballot. Now they could have no label whatsoever. Senate Bill 269 ***. The 1951 bill also provided that presidential candidates could not use the independent candidate procedure; and it raised the

the independent candidate procedure; and it raised the independent petition procedure from 1% of the last vote cast to 7%.

In 1968 the U.S. Supreme Court declared the Ohio ballot access laws concerning minor parties and independents unconstitutional. The 1969 and 1971 legislatures lowered the full-fledged party petition from 15% to 1% of the last vote cast, and lowered the independent candidate procedure (for statewide office) from 1% of the last vote cast, to 5,000 signatures. Also, the ability of presidential candidates to use the independent procedure was restored.*** However, the 1969 and 1971 legislatures did not restore the ability of candidates who use the independent procedure to choose a partisan label, not even the label 'independent.'

Thus, between 1892 and 1947, candidates who used the independent candidate petition procedure were free to choose a partisan label, which was printed on the general ballot next to the candidates' names. All of the minor political parties which appeared on the ballot in Ohio between 1892 and 1947 used the independent candidate procedure. None used the alternative full party petition procedure (which was created in 1929). Since 1947, even though candidates who use the independent candidate petition procedure have not been permitted to choose a partisan label, the vast majority of minority party candidates who have appeared on the Ohio general election ballot have still used the independent candidate petition procedure. Of the 47 instances between 1947 and 1998 at which minor parties qualified candidates for the statewide Ohio general election ballot by completing a petition, in 43 instances they used the independent candidate petition procedure. There are only 4 instances at which they used the full party petition procedure. The list of minor parties which placed candidates on the Ohio general election ballot for statewide

office between 1947 and 1996, is attached.[1] The only minor parties which placed candidates on the ballot by using the full party petition procedure are the American Party in 1976, the Libertarian Party in 1982, the Reform Party in 1996, and the Natural Law Party in 1996 (note: the Socialist Labor Party appeared on the 1970 and 1972 ballot by court order, and the American Independent Party appeared on the 1968, 1970 and 1972 ballot by court order; the reform party will appear on the 1998 ballot because it polled over 5% of the 1996 vote).[2]

The reason minor parties commonly use the independent candidate petition procedure, rather than the full party petition procedure, is that the independent petition procedure has a deadline which is 4 months later than the full party petition procedure; and also the number of signatures required by the independent procedure is significantly less than the number required for full party status. Also, the independent candidate procedure can be used in just a single congressional or legislative district, or in a single county; but the full party petition procedure can only be used statewide, or not at all. Thus if a party desires to qualify in part of the state, it has no option but to use the independent candidate procedure.

However, minor parties pay a price when they use the independent candidate petition procedure, since (ever since 1947) this procedure does not permit choice of a partisan label. As a result, some voters who desire to vote for the candidate of a particular minor party are unable to do so, since the voter does not know which candidate is the

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1 Appendix p.

2 The Libertarian Party successfully used the full party petition procedure in the 2000 general election.

candidate of that voter's favored minor party. Evidence that this is so, computed from official election returns, is presented in my article 'Ballot Format: Must Candidates be Treated Equally?' in Volume 45, number 1, Cleveland State Law Review, 1997, page 87. The article is attached. Illustrating this evidence are three maps, which were not part of the original article, which are attached to this affidavit. One shows the Libertarian percentage of the vote for president in 1992; one shows the Libertarian percentage of the vote for president in 1996; and one shows the Natural Law Party percentage of the vote for president in 1996. *** The Libertarian maps show that the Libertarian presidential candidate did significantly worse in Ohio than in the neighboring states. The Natural Law Party map shows that the Natural Law Party presidential candidate, by contrast, did not do worse in Ohio than in the neighboring states since he had the label 'Natural Law' next to his name in Ohio, since the Natural Law party was a qualified party

Thirty-one states permit the candidate of a non-qualified party (who is seeking a place directly onto the November ballot by a petition which carries that candidate's name) to choose a partisan label which will appear on the November ballot next to the name of that candidate.***

In another eleven states not named [in the preceding paragraph] , the number of signatures required for a fully-qualified party petition is no higher than the number of signatures for an independent candidate. Thus the Ohio problem doesn't exist in those eleven states either (by the 'Ohio problem' I mean the problem of minor parties having to forego a partisan label, if they seek to minimize the number of signatures they have to collect)." Petitioners' Cross-Motion for Summary Judgment, Affidavit of Richard Winger. The trial court granted Petitioners' motion, and enjoined Respondents to place the partisan voting cue "Libertarian" next to Petitioner Schrader's name on the

general election ballot.

REASONS FOR GRANTING THE WRIT

I IT IS UNCONSTITUTIONAL FOR A STATE TO DENY A PARTISAN BALLOT LABEL TO THE NOMINEES OF MOST POLITICAL PARTIES WHEN THAT SAME STATE PERMITS A LABEL FOR DEMOCRATIC NOMINEES, REPUBLICAN NOMINEES, AND INDEPENDENT CANDIDATES.

If this Court determines that the Petitioners' Writ of Certiorari should be granted, the Court must determine the constitutionality of the the discriminatory procedure legislated by the State of Ohio to deny a partisan ballot label to the nominees of most political parties. The Court should also determine an adequate remedy for Petitioners.

It is constitutionally impermissible for a State to violate freedom of speech and association in its efforts to manipulate the content of a ballot, and furthermore, such efforts must not violate equal protection of the laws.

The offending statute in Ohio harshly discriminates against voters who desire to support a particular minor party, but who may lack sufficient information to know who that party's particular candidates are. The statute , for practical purposes, effectively excludes minor party or third party candidates. The statute runs afoul of the concept that states have no authority to discriminate against any class of candidates for congress. Cook v. Gralike, 531 US. _____(2001)(Slip Opinion no. 99-929). Justice Kennedy's concurrence observed that" a state simply lacks the power to impose any conditions on the election of Senators and Representatives, save neutral provisions as to the time, place, and manner of elections.. ."

Representatives, save neutral provisions as to the time, place, and manner of elections.. ."

This Court has stated that "The right to vote is protected in more than the initial allocation of the franchise. Equal Protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one persons vote over another. Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Bush v. Gore, 531 US.____(2000) (per curiam), citing Harper v. Virginia Bd. of Elections, 383 US. 663,665 (1966). This Court has also observed that "It must be remembered that the 'right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Id., citing Reynolds v. Sims, 377 US. 533,535 (1964).

The offending statute simply prevents most minor parties, most of the time, from displaying a partisan voting cue next to their candidates name, and by extension prevents the electorate from making an informed choice. Often, more than one, or several minor party candidates run for the same office, yet the State of Ohio forces them all to run under the same "independent" banner. Voters who have allegiance to a minor party or the political philosophy espoused by that party but who are unaware of the names of specific candidates are thus deprived of information necessary to make an informed choice. Indeed, since many minor party philosophies are diametrically opposed to each other, voters could easily and in all probability do vote for a party and philosophy they detest under a system that lumps all minor parties together under the banner independents. In fact, they are not independent but represent distinct political groups and views. Of course, candidates from either the Republican

candidates. In Williams v. Rhodes, 393 U.S. 23,25 (1968), this Court overturned a series of Ohio election laws that made it "virtually impossible" for candidates unaffiliated with the two established parties to successfully run for office. The Court declared that the legislation limited political participation of the third party candidates so dramatically that the Republicans and Democrats had a complete monopoly. The resulting burden on voting and First Amendment associational rights was held to be "an invidious discrimination, in violation of the Equal Protection Clause." Id., at 32,34. Petitioner submits that this is still the case in Ohio, and that the offending statute is part of the surviving remnant of the "series of Ohio election laws" that this Court has not yet reviewed and struck.

Certainly a label which is not indicative of what a political party stands for, and which lumps various and divergent political parties together, is both confusing to voters and an adversity to the minor political party and their candidates. For example, Libertarians and Socialists are diametrically opposed on the political spectrum and are at odds on every single political issue, yet candidates from these parties are lumped together in Ohio under the banner "independent". This court has held that it is "clear that adverse labels handicap candidates 'at the most crucial stage in the election process — the instant before the vote is cast." Anderson v. Martin, 375 US. 399,402 (1964).

Competition in ideas and government policies is at the core of our electoral process and of the First Amendment freedoms. Williams. v. Rhodes, 393 US. 23,32. Indeed, this information is so important that the First Amendment "prohibit[s} government from limiting the stock of information from which members of the public may draw." First National Bank of Boston v. Belloti, 435 US. 765, 783 (1978). Thus, the First Amendment protects not only the right to speak about political issues, but also the right to receive this information as well. Richmond Newspapers, Inc. v.

draw." First National Bank of Boston v. Belloti, 435 US. 765, 783 (1978). Thus, the First Amendment protects not only the right to speak about political issues, but also the right to receive this information as well. Richmond Newspapers, Inc. v. Virginia, 448 US. 555, 587-588 (1980). Here Ohio's prohibition of any designation for "unqualified" parties denies the right to communicate and receive ideas which "is a necessary predicate to the recipient's meaningful exercise of his own rights of.. .political freedom." Board of Education, Island Trees v. Pico, 457 US. 853,867(1982).

Finally, this Court observed in Anderson v. Celebrezze, 460 US. 780,793-794 (1983):

> A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and — of particular importance- against those voters whose political preferences are outside the existing political parties.

It is clear that Ohio Revised Code Section 3505.03 unconstitutionally impairs the associational rights of those voters who may whish to support a new party or "unqualified" party candidate.

CONCLUSION

The Southern District Court of Ohio, Western Division, properly analyzed the legal issues in this case and ruled in a just and correct manner. The Sixth Circuit Court of Appeals effectively ignored or reversed its own precedent and stood the logic of U.S. Supreme Court precedent on its

order that the Petitioners had a constitutional right to full, free, and fair ballot access in accordance with their associational rights and Equal Protection of the Laws.

Respectfully Submitted,
Marina Tramontozzi
Counsel of Record
815 15th Street, N.W.
Suite 601
Washington, D.C. 20005
(202) 393-1070

No. 00-3044

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES SCHRADER; BRUCE WILSON;
LIBERTARIAN PARTY OF OHIO,
Plaintiffs-Appellees,

v.

J. KENNETH BLACKWELL, Ohio Secretary of State,
Defendant-Appellant, CLARK COUNTY BOARD OF
ELECTIONS, Defendant.

January 31, 2001, Argued
February 23, 2001, Decided
February 23, 2001, Filed

DISPOSITION:
Judgment of district court REVERSED.

COUNSEL:
ARGUED: Arthur James Marziale, Jr., OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellant.

William V. Stephenson, WOOD COUNTY PUBLIC DEFENDER, Bowling Green, Ohio, for Appellees.

ON BRIEF: Arthur James Marziale, Jr., OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellant.

William V. Stephenson, WOOD COUNTY PUBLIC DEFENDER, Bowling Green, Ohio, for Appellees.

JUDGES:
Before: DAUGHTREY and GILMAN, Circuit Judges; HEYBURN, District Judge. *

* The Honorable John G. Heyburn II, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINIONBY:
RONALD LEE GILMAN

OPINION:

RONALD LEE GILMAN, Circuit Judge. James Schrader received the nomination of the Libertarian Party of Ohio to be its candidate for the United States House of Representatives from the Seventh Congressional District of Ohio in the 1998 general elections. Schrader filed a nominating petition with the Clark County Board of Elections that contained 3,168 signatures, a number sufficient under Ohio law to secure his place on the ballot. The Libertarian Party of Ohio, however, had not met the requirements to be recognized as a political party in Ohio at that time. As a result, Ohio law prohibited Schrader from designating his affiliation with the Libertarian Party as a partisan "cue" on the ballot.

Schrader, the Libertarian Party, and Bruce Wilson, a voter, filed an action under *42 U.S.C. § 1983* against Ohio's Secretary of State and the Clark County Board of Elections to designate Schrader as a "Libertarian" on the ballot, claiming that the Ohio ballot-form statute violated the First and Fourteenth Amendments to the United States

Constitution. The district court held for Schrader, declaring that the Ohio statute prohibiting voting cues for unqualified political parties was unconstitutional. The state of Ohio now challenges that decision. For the reasons set forth below, we REVERSE the judgment of the district court.

I. BACKGROUND

A. Ohio election laws pertaining to voting cues

At issue in this appeal are two sections of the Ohio Revised Code that combine to regulate how eligible candidates appear on the general-election ballot. The first describes the ballot format. See Ohio Rev. Code § 3505.03. Voting cues, which are descriptions of political affiliation, are allowed under this section, but only for candidates of political parties that are recognized under Ohio law. "Under the name of each candidate nominated at a primary election and each candidate certified by a party committee . . . shall be printed, in less prominent type face than that in which the candidate's name is printed, the name of the political party by which the candidate was nominated or certified." Id.

The second relevant section defines a political party under Ohio law. See Ohio Rev. Code § 3517.01. "A political party . . . is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for that office or that filed with the secretary of state." Id. If, however, a new political party seeks to become qualified, then it must file a "petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the most recent election,

declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing." Id. As a result, a candidate must be the nominee of a qualified party as defined under Ohio Revised Code § 3517.01 in order to obtain a partisan cue on the ballot pursuant to Ohio Revised Code § 3505.03. An independent candidate for election to an office, in contrast, must simply file a statement of candidacy and a nominating petition with the requisite number of signatures. See Ohio Rev. Code § 3513.257.

In sum, all candidates listed on the Ohio ballot must gain access either as the nominee of a qualified political party, through the independent-petition procedure, or as a member of a previously unqualified political party that obtains enough signatures to become a political party as defined in Ohio Revised Code § 3517.01. Both Schrader and the Ohio Attorney General agree that Ohio Revised Code § 3505.03 was properly interpreted to deny Schrader, and other future candidates who, like him, are members of unqualified political parties, a partisan cue on the ballot.

Ohio's election laws have been the subject of constitutional scrutiny in several prior cases. One is *Williams v. Rhodes, 393 U.S. 23, 32, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968)* (declaring Ohio's ballot-access scheme that required a new party to collect the signatures of 15 percent of the electors in the previous gubernatorial election unconstitutional because it was so restrictive, and because it effectively provided the Democratic and Republican parties with a "complete monopoly"). Another is *Anderson v. Celebrezze, 460 U.S. 780, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983)* (striking down Ohio's early deadline for independent candidates to file a statement of candidacy and

a nominating petition as an unconstitutional burden on the voting and associational rights of their supporters). More recently, however, this court has upheld the signature requirement of Ohio's independent-petition procedure under Ohio Revised Code § 3513.257, finding that the burden of obtaining the signatures of one percent of the qualified electors in the last gubernatorial election is not unconstitutionally burdensome. See *Miller v. Lorain County Bd. of Elections, 141 F.3d 252 (6th Cir. 1998).*

The specific sections at issue in Schrader's case, § § 3505.03 and 3517.01, were scrutinized by this court in *Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992).* In particular, the plaintiff in Rosen challenged the failure of § 3505.03 to allow the cue of "Independent" to be used for candidates who gain access to the ballot through the independent-petition procedure. This court held that § 3505.03 was "unconstitutional because it violates the First and Fourteenth Amendment rights of Independent candidates to be so designated on Ohio's general election ballots." *Rosen, 970 F.2d at 178.*

Despite this court's ruling in Rosen, the Ohio legislature reenacted § 3505.03 in 1995 without any changes to the portion of the statute that deals with voting cues on the ballot. Schrader is thus challenging the same voting-cue language in Ohio Revised Code § 3505.03 that this court struck down vis-a-vis independent candidates in Rosen. At oral argument, however, counsel for the state noted that Ohio regularly follows Rosen, even though the relevant portion of the statute has not changed. It does so by informally asking candidates who gain access to the ballot through the independent-petition procedure whether they wish to have the cue "Independent" affiliated with their names on the general-election ballot.

Schrader notes that as a result of the connection between § 3505.03 and § 3517.01, a previously unqualified party that wishes to place a candidate on the general-election ballot with the party's voting cue must file the requisite number of signatures approximately one year before the general election. This results in an earlier filing deadline for candidates of unqualified political parties than for independent candidates. The discrepancy in the timing of the filing deadlines, however, was not raised as an issue on appeal and is therefore not before us. Schrader obtained access to the ballot under the independent-petition procedure, and his only challenge is to the constitutionality of Ohio's ballot-cue system under § 3505.03.

B. Procedural history of the Libertarian Party of Ohio's challenge to the Ohio ballot scheme

The Libertarian Party of Ohio was formed in 1972 and is the Ohio affiliate of the national Libertarian Party, founded in Colorado in 1971. It obtained the status of a political party as defined under Ohio Revised Code § 3517.01 in 1982, and was therefore eligible for a voting cue on the general-election ballot that year as permitted by Ohio Revised Code § 3505.03. The Libertarians failed to poll at least five percent of the voters in the 1982 election, however, thus losing their status as a recognized political party. Not until November of 1999 - a year after the events in question - did the Libertarian Party of Ohio again succeed in obtaining enough signatures to qualify as a political party on the general-election ballot.

On April 25, 1998, the Libertarian Party of Ohio held its annual convention in Akron. Among other items of business, it nominated Schrader as its candidate for the United States House of Representatives from the Seventh Congressional District. Schrader had been circulating

petitions to obtain the requisite signatures to be placed on the general-election ballot prior to the convention. Because he was applying through the independent-petition procedure, Schrader needed to collect at least 1,876 valid signatures, a number equal to one percent of the voters who participated in the last gubernatorial election in the Seventh Congressional District. Schrader used official nominating-petition forms prepared by the state of Ohio for use by independent candidates. Directly above the "Statement of Candidacy" heading on each nominating petition, however, Schrader typed this additional statement: "James A. Schrader is the nominee of the Libertarian Party." On April 29, 1998, Schrader submitted petitions containing 3,168 signatures to the Clark County Board of Elections.

Because Schrader met the requirements of the independent-petition procedure, the Board of Elections placed him on the ballot as an independent candidate. On July 30, 1998, Schrader sent a letter to Bob Taft, then the Ohio Secretary of State, requesting that Schrader receive the voting cue of "Libertarian" on the general-election ballot. Schrader duly noted in his letter that the state had failed to amend the relevant portion of Ohio Revised Code § 3505.03, despite its having been declared unconstitutional by Rosen. Secretary Taft did not respond to Schrader's request. Schrader, Wilson, and the Libertarian Party of Ohio then filed a complaint on August 19, 1998 in the district court, requesting injunctive and declaratory relief.

After Schrader filed an amended complaint, both parties moved for summary judgment. On September 28, 1998, the district court entered a preliminary injunction directing the Secretary of State to place the designation "Libertarian" after Schrader's name on the ballot. Schrader received 9,146 votes, or 5.09 percent of the votes cast in the race for the Seventh Congressional District, with the voting cue of

"Libertarian" appearing on the general-election ballot in November of 1998.

Following the election, the district court allowed the parties to file supplemental briefs and renewed motions for summary judgment. Determining that the issue was not moot, because it was "capable of repetition, yet evading review," *Rosen v. Brown, 970 F.2d 169, 173 (6th Cir. 1992),* the district court entered an order granting Schrader's motion for summary judgment and denying Ohio's motion. The district court concluded that Ohio's denial of a partisan voting cue for Schrader, and for other candidates like Schrader who are members of unqualified political parties, is a violation of the First and Fourteenth Amendments.

In this appeal, the Ohio Secretary of State contends that the district court erred in holding that the reenacted version of Ohio Revised Code § 3505.03 is unconstitutional. Ohio specifically argues that the Sixth Circuit precedent of Rosen does not extend to this case, because the state's interests in regulating political-party candidates is inherently greater than its interests in regulating independent candidates. Furthermore, Ohio maintains that its legitimate interest in regulating elections and controlling the recognition of political parties outweighs any encroachment on the associational and equal protection rights of Schrader and the Libertarian Party of Ohio.

II. ANALYSIS

A. Framework for election-law analysis

We review de novo the district court's grant of summary judgment. See, e.g., *Holloway v. Brush, 220 F.3d 767, 772 (6th Cir. 2000).* Summary judgment is proper when there

are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).* The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).* A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id. at 252.*

In determining the constitutionality of election laws, the balancing test set forth in *Anderson v. Celebrezze, 460 U.S. 780, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983),* must be applied. Anderson directs courts to proceed as follows:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide

whether the challenged provision is unconstitutional.

460 U.S. at 789. The Supreme Court has subsequently recognized, however, that if a state's election law subjects the First and Fourteenth Amendment rights of participants in the political process to "'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi, 504 U.S. 428, 434, 119 L. Ed. 2d 245, 112 S. Ct. 2059 (1992)* (holding that Hawaii's prohibition of write-in voting was not a severe restriction that infringed upon its citizens' rights under the First and Fourteenth Amendments) (citation omitted). As the district court found and the following analysis will show, the burden placed on Schrader and the Libertarian Party of Ohio was not so severe as to trigger the strict-scrutiny review as outlined in Burdick. We will therefore focus on the application of the Anderson balancing test to Schrader's challenge to Ohio Revised Code § 3505.03.

B. The district court failed to give sufficient weight to the state's interest in regulating elections when applying the Anderson balancing test.

In applying the Anderson balancing test to Schrader's claim, the district court concluded that the interests put forward by Ohio were not so compelling as to override the First and Fourteenth Amendment rights of Schrader and other similarly situated candidates of unqualified political parties. The district court therefore declared Ohio Revised Code § 3505.03 unconstitutional. Challenging this decision, Ohio contends that the district court mistakenly relied on this court's decision in Rosen in assessing the extent to which the Ohio election laws deprived Schrader and the

Libertarian Party of Ohio of their First and Fourteenth Amendment rights. Furthermore, Ohio argues that the district court gave insufficient weight to the state's interest in regulating elections when evaluating the balance of interests under the Anderson test. The following analysis of the competing burdens and interests under the Anderson balancing test will assess these claims.

The first step of the Anderson test requires us to examine the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments. See *Anderson, 460 U.S. at 789.* No one challenges the basic principle that the United States Constitution protects the rights of those involved in the political process. As stated by the Supreme Court in

> *Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989):*
>
> It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments . . . . Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, . . . but also that a political party has a right to identify the people who constitute the association, . . . and to select a standard bearer who best represents the party's ideologies and preferences.

Id. at 224 (citations and internal quotation marks omitted). Similarly, the First Amendment rights of voters and political parties are protected from unequal regulatory burdens under the Equal Protection Clause of the Fourteenth Amendment.

See *Williams v. Rhodes, 393 U.S. 23, 30, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968).*

In the present case, the district court relied on this court's decision in *Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992),* to determine that Ohio Revised Code § 3505.03 violated Schrader's and the Libertarian Party of Ohio's First and Fourteenth Amendment rights. The court in Rosen heard testimony from two political scientists and a marketing and communications professional to the effect that party identification and the indication of a candidate's party affiliation on a ballot in the form of a voting cue play a crucial role in a voter's actions at the "climactic moment of choice" in an election. *Rosen, 970 F.2d at 172-75.* Because § 3505.03 provides cues only for candidates of qualified political parties, it did not allow for the designation of "Independent" as a voting cue for those who gained access to the ballot through the independent-petition procedure.

This law, Rosen concluded, "infringes upon the right of supporters of Independent candidates to meaningfully vote and meaningfully associate by providing a 'voting cue' to Democratic and Republican candidates" but not to independent candidates. *Id. at 176.* Furthermore, the court held that "the statute violates the Equal Protection Clause of the Fourteenth Amendment because it places unequal burdens on Independent and third-party candidates and is designed to give Democrats and Republicans a decided advantage at the polls in a general election." *Id. at 177-78.* Expanding on Rosen's analysis, the district court determined that the associational interests of Schrader and the Libertarian Party of Ohio to obtain a ballot cue were even stronger than those of independent candidates, because Schrader actually represents a specific ideology that he

would like to have conveyed through a voting cue on the ballot.

The Supreme Court has acknowledged that "to the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party, 479 U.S. 208, 220, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986).* In declaring Ohio Revised Code § 3505.03 unconstitutional in Rosen, this court determined that "once a State admits a particular subject to the ballot and commences to manipulate the content or to legislate what shall and shall not appear, it must take into account the Federal and State Constitutions regarding freedom of speech and association, together with the provisions assuring equal protection of the laws." *970 F.2d at 175.*

Nevertheless, the Supreme Court has recognized the distinction between the role of independent candidates and that of political parties:

> The political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with a new party would mean giving up his ties with another party or sacrificing his own independent status, even

> though his possible interest in the new party centers around a particular candidate for a particular office.

Storer v. Brown, 415 U.S. 724, 745, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974) (upholding as constitutional California's requirement that an independent candidate for congressional or presidential office must be politically disaffiliated for at least one year prior to the immediately preceding primary election). The district court's heavy reliance on Rosen was therefore misplaced, particularly in light of Ohio's interests that must be balanced against the encroachment upon Schrader's and the Libertarian Party of Ohio's First and Fourteenth Amendment rights.

Moving to the second step of the Anderson balancing test, we must now identify and evaluate Ohio's interests that would justify imposing a burden on associational rights. See *Anderson, 460 U.S. at 789.* No one questions the basic premise that states are entitled to regulate elections. "As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer, 415 U.S. at 730.* Ohio claims that denying party labels to candidates of unqualified political parties minimizes voter confusion, prevents voter deception, and promotes political stability.

The Supreme Court has acknowledged a state's strong interest in maintaining the stability of its political system. See *Eu, 489 U.S. at 226; Storer, 415 U.S. at 736.* Additionally, the Court has held that there is an "important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot - the interest, if no other, in avoiding confusion, deception, and

even frustration of the democratic process at the general election." *Jenness v. Fortson, 403 U.S. 431, 442, 29 L. Ed. 2d 554, 91 S. Ct. 1970 (1971)* (upholding Georgia's system that distinguishes between candidates of "political parties" and unrecognized "political bodies," and requires independent candidates and candidates of unrecognized political bodies to file nominating petitions containing the signatures of five percent of the eligible voters in the previous election).

In declaring § 3505.03 unconstitutional, the district court nevertheless maintained that "nothing in [its] Decision should be read as casting doubt on the validity of Ohio Revised Code § 3517.01." This position, however, is untenable. By allowing a candidate who gains access to the ballot through the independent-petition procedure to choose any partisan cue that he or she desires, the district court has in effect denied Ohio the right to reasonably regulate the formation of political parties within its borders.

Finally, the Anderson test requires balancing the character and magnitude of the constitutional injury to Schrader and the Libertarian Party of Ohio against the state's interests. Ohio argues that its ballot-access scheme that differentiates between the party-petition procedure and the independent-petition procedure is precisely the type of reasonable regulation that requires a candidate of an unqualified party to show a "significant modicum of support" in order to secure a party-affiliation voting cue on the ballot. The Supreme Court is in agreement: "The State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits, by those who have provided the statutorily required petition or ballot support." *Timmons v. Twin Cities Area New Party, 520 U.S. 351, 366, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997).*

Schrader, however, maintains that Timmons is factually distinguishable and should not apply to the case before us. At issue in Timmons was Minnesota's antifusion law, which the Court upheld. Under that law, a candidate on a ballot cannot appear as the candidate of more than one party. See *id. at 354.* Although the context of the Timmons decision is different from the Ohio law under scrutiny here, Timmons emphasizes the importance of our role under Anderson to balance Ohio's interests in regulating political parties against the constitutional rights of Schrader and the Libertarian Party of Ohio.

Furthermore, other circuits have engaged in similar reviews of state election laws and have concluded that the states have significant authority to regulate the formation of political parties and the identification of candidates on the ballot. See *McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215 (4th Cir. 1995)* (upholding as constitutional North Carolina's requirement that a candidate of a new political party gather signatures of 2% of voters statewide, with at least 200 signatures from registered voters residing in each of 4 congressional districts, and then requiring the new party candidate to poll at least 10% of votes in the general election for that party to remain on the ballot); *Rainbow Coalition v. Oklahoma State Election Bd., 844 F.2d 740 (10th Cir. 1988)* (finding constitutional Oklahoma's election scheme that authorizes candidates of recognized parties to be automatically identified on the ballot by party label, but requires unrecognized parties to file petitions bearing the signatures of at least 5% of the total votes cast in the last general election to achieve similar identification); *Libertarian Party v. Florida, 710 F.2d 790, 795 (11th Cir. 1983)* (upholding as constitutional an election law under which "a minor political party may not run a candidate in a local election without first obtaining access to

the state's general election ballot through the 3% statewide petitioning requirement").

Because "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *Anderson, 460 U.S. 780, 788, 75 L. Ed. 2d 547, 103 S. Ct. 1564,* a party challenging Ohio Revised Code § 3505.03 bears a heavy constitutional burden. "That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights." *Timmons, 520 U.S. at 359.* With or without the cue "Libertarian," Schrader had gained access to appear on the general-election ballot under the independent-petition procedure as an "Independent."

In conclusion, we acknowledge that Ohio's ballot scheme places a burden on political parties to become recognized under Ohio law before a member can appear on the general-election ballot as a candidate of that party. We hold, however, that this burden is not unreasonable in light of Ohio's legitimate interests and is not so onerous as to make the law unconstitutional under the Anderson balancing test. Even though the Ohio legislature reenacted Ohio Revised Code § 3505.03 without reflecting the effect of this court's ruling in Rosen as it pertains to independent candidates, Ohio retains the right to ensure that candidates claiming to represent a political party meet the statutory requirements necessary to establish that the putative party has obtained "some preliminary showing of a significant modicum of support" before appearing on the ballot as a candidate of that party. *Jenness, 403 U.S. at 442.* We therefore hold that the denial of party-affiliation voting cues to candidates of unqualified political parties under § 3505.03 of the Ohio Revised Code survives constitutional challenge.

III. CONCLUSION

For all of the reasons set forth above, we REVERSE the judgment of the district court.

Case No. C-3-98-357

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

JAMES SCHRADER, et al.,
Plaintiff,

v

BOB TAFT, Secretary of State, et al.,
Defendant.

December 13, 1999, Decided

DISPOSITION:
Final judgment entered in favor of Plaintiffs and against Defendants.

COUNSEL:
For JAMES SCHRADER, BRUCE WILSON, LIBERTARIAN PARTY OF OHIO, plaintiffs: William V Stephenson, Wood County Public Defender, Bowling Green, Oh.

For BOB TAFT, J KENNETH BLACKWELL, defendants: Arthur James Marziale, Jr., Ohio Attorney General - 2, Chief Counsel's Staff Section, Columbus, OH.

For BOB TAFT, J KENNETH BLACKWELL, defendant: Jeffrey Hartranft, Assistant Attorney General, Workers' Compensation Section, Columbus, OH.

For CLARK COUNTY BOARD OF ELECTIONS, defendant: Thomas Edward Trempe, Clark County Prosecutor - 3, Springfield, OH.

JUDGES:
Michael R. Merz, United States Magistrate Judge.

OPINIONBY:
Michael R. Merz

OPINION:

DECISION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

This case is before the Court on Cross-Motions for Summary Judgment (Doc. ## 8, 11, and 13) and Supplemental Cross-Motions for Summary Judgment (Doc. ## 29, 31).

PROCEDURAL POSTURE

This action was filed August 20, 1998, shortly after Secretary of State Taft denied Mr. Schrader's written demand for the relief he seeks here. Plaintiffs James Schrader, Bruce Wilson, and the Libertarian party of Ohio brought this action pursuant to *42 U.S.C. § 1983* to compel Defendants Bob Taft, then Ohio's Secretary of State[1], and the Clark County Board of Elections to designate Mr. Schrader as a "Libertarian" on the November, 1998, general election ballot. The parties agreed that the last date on which Secretary of State Taft could make a decision affecting ballot language was September 29, 1998. They therefore also agreed to present the case to the Court on cross-motions for summary judgment, without an

evidentiary hearing and without reply memoranda. After the Court decided the case on that basis, Defendants objected that Plaintiffs had changed theories and requested an opportunity to supplement the record. The Court then converted its Decision and Order to a preliminary injunction, Defendants designated Mr. Schrader as a "Libertarian" on the ballot in the Seventh Congressional District, and he received almost 9,000 votes, but was not elected.

Subsequent to the November, 1998, election, the parties have submitted additional materials, but still stipulate that the case be decided on cross-motions for summary judgment. The Court is accordingly empowered and indeed constrained to make findings of fact from these submissions[2].

Since the election for which Mr. Schrader sought ballot designation has concluded, the Court requested the parties to comment on whether the issues raised had become moot. All parties agree that they are not, in that the case presents issues capable of repetition yet evading review (See Doc. ## 33, 34). The Court agrees. See *Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992).*

OPINION

Plaintiff Libertarian Party of Ohio (the "Party") was formed in 1972 and is the recognized Ohio affiliate of the Libertarian Party, founded in Colorado in 1971 (Affidavit of James H. Babka, Jr., Exhibit to Doc. # 13). It has placed candidates for President of the United States on the Ohio ballot by petition in every presidential election after 1972 (Id.). One becomes a member of the Libertarian Party of Ohio by contributing at least $ 25.00 and signing a pledge showing support for Party principles (Id.). The party has

nearly one thousand members statewide and fifty-one members residing in the Seventh Congressional District (Id.)

The Libertarian Party of Ohio held its 1998 annual convention business meeting in Akron on April 25, 1998 (Minutes, Exhibit to Doc. # 13). Among other actions, it nominated Mr. Schrader as its candidate for the United States House of Representatives from the Seventh District by voice vote (Id.) No other persons were nominated for any public office, but Scott Smith reported that 9,991 signatures had been gathered "towards the full-party status petition drive" (Id.) It has been publicly reported, although the evidence is not before the Court, that the Libertarian Party has gathered enough signatures to achieve recognized party status. However, if it fails to poll 5% of the vote in the Presidential ballot in 2000, it will lose that status again.

Shortly after receiving the Party nomination, Mr. Schrader filed nominating petitions with Defendant Clark County Board of Elections containing 3,168 signatures (Schrader Affidavit, Exhibit to Doc. # 13). Only 1,876 valid signatures were required and at least that many were contained in Mr. Schrader's petitions, so he was been certified to appear on the ballot in the November general election. Pursuant to the preliminary injunction, he appeared with the "Libertarian" designation.

Ohio Revised Code § 3505.03 provides in pertinent part:

> Under the name of each candidate nominated at a primary election and each candidate certified by a party committee to fill a vacancy under section 3513.31 of the Revised Code shall be printed, in less prominent type face than that in which the candidate's name

> is printed, the name of the political party by which the candidate was nominated or certified.
>
> Except as provided in this section, no words, designations, or emblems descriptive of a candidate or his political affiliation or indicative of the method by which the candidate was nominated or certified, shall be printed under or after a candidate's name which is printed on the ballot.

The parties agree that § 3505.03, correctly interpreted, prevented Defendants from listing Mr. Schrader on the ballot as he requested. The sole question before this Court is whether § 3505.03 can be constitutionally applied to deny Mr. Schrader or a similarly situated person the ballot designation he and the other Plaintiffs sought.

It is uncontested that, while Mr. Schrader is the nominee of the Libertarian Party of Ohio, he was not nominated at a primary election. The Party did not have a primary election because it was not a "qualified" party in 1998. Under Ohio Revised Code § 3517.01, a political party within the meaning of Ohio's election laws (Title 35 of the Revised Code) is any group of voters (1) whose candidate for governor or nominees for presidential electors received at least five per cent of the vote in the last gubernatorial or presidential election or (2) subsequent to any election in which it did not receive five per cent of the vote, filed with the secretary of state a petition to be a political party signed by one per cent of the voters in the last gubernatorial or presidential election. The petition must be filed not later than 120 days before the next primary election in which the group of voters, now a party, intends to participate. If the party thereafter fails to get five per cent of the gubernatorial

or presidential vote, it ceases to be a political party, but nothing prevents it from re-petitioning for ballot access. The Libertarian Party of Ohio achieved party status in 1982, but has failed to maintain it since (Babka Affidavit, Winger Affidavit, Exhibits to Doc. # 13), although since the 1998 general election it apparently has again gathered enough signatures statewide.

Plaintiffs rely heavily on *Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992)*. A detailed analysis of that decision is required to decide this case. The case was brought by Russell Rosen, a candidate nominated by petition (Ohio Revised Code § 3513.257), just as Mr. Schrader was, for the Ohio House of Representatives. He was not affiliated with any political party and sought the designation "Independent" on the ballot, which Defendants refused under Ohio Revised Code § 3505.03.

The Sixth Circuit held that a ballot access case of this sort must be judged under the standard adopted by the Supreme Court in *Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)*, rather than a strict scrutiny test. That standard is:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

> Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Rosen, 970 F.2d at 175, quoting *Anderson, 460 U.S. at 789.* Applying *Anderson* to Ohio Revised Code § 3505.03, the Sixth Circuit made a number of important rulings:

1. A general election ballot is necessarily short. It does not allow for narrative statements by candidates and requires a response which must be counted. *970 F.2d at 175,* citing *Bachrach v. Secretary of Commonwealth, 382 Mass. 268, 415 N.E.2d 832 (1981).* Within those parameters, the State has discretion which must be exercised "in subordination to relevant constitutional guaranties."

2. Although a State would be free to print no designations on the ballot, once it decides to do so, it must take into account freedom of speech, freedom of association, and equal protection guaranties. Id., citing *Bachrach and Riddell v. Nat'l Democratic Party, 508 F.2d 770, 775-79 (5th Cir. 1975).*

3. "The primary concern in any ballot access case is not the interests of the candidate but of the voters who support and candidate and the views espoused by the candidate." *Id.*, citing *Cromer v. State of South Carolina, 917 F.2d 819, 822 (4th Cir. 1990)*(citing *Anderson*). Failure to have a "voting cue" on the ballot such as is provided to Republican and Democratic candidates "make it virtually impossible for Independent candidates to prevail in the general election." *970 F.2d at 176.*

4. "Ohio has identified the precise interests which it relied on as a justification for section 3505.03," to wit, "minimizing ballot-generated voter confusion" and "producing a manageable ballot." These asserted interests are "somewhat specious, and section 3505.03 is nothing more than a deliberate attempt by the State to protect and guarantee the success of the Democratic and Republican parties." *Id.*

5. While a State may protect the integrity of established and formally recognized major political parties, it is not free to do so by excluding Independent and new party candidacies. *Id at 177.*

6. Excluding the "Independent" designation does not result in a more manageable ballot. *Id.*

In granting the preliminary injunction in this case, the Court held:

> Applying the *Anderson* test as interpreted by the Sixth Circuit in *Rosen*, this Court concludes that Ohio Revised Code § 3505.03 as applied by Defendants to refuse to designate Mr. Schrader as "Libertarian" violates the First Amendment freedom of association rights of all Plaintiffs and the Fourteenth Amendment equal protection rights of Mr. Schrader for the following reasons.
>
> First of all, the associational rights of these Plaintiffs are stronger than those of the plaintiffs in Rosen. Plaintiffs stand for something: the political principles of the

Libertarian Party. How much a voter understands by that designation will depend in large part on how successful plaintiffs are in communicating, by means other than the ballot designation, what those principles are. In contrast, the label "Independent" does not necessarily convey any information about a candidate except that he or she is not an endorsed Democrat or Republican. If the associational interests of "independents" are strong enough to override § 3505.03, *a fortiori* the interests of Libertarians are strong enough to do the same.

Secondly, Mr. Schrader's equal protection interests are identical to those of Mr. Rosen. If Mr. Rosen was unconstitutionally disadvantaged by the absence of a "voting cue," Mr. Schrader, nominated under the same statute and facing the same lack of "voting cue," will be equally disadvantaged.

Third, the State of Ohio has identified no interests here different from those identified in *Rosen*, but those interests do not weigh any more heavily here than in the prior case. The ballot is already limited to a manageable size by requiring that those not nominated by primary obtain a significant number of petition signatures. The label "Libertarian" is certainly no more confusing than "Independent" and arguably less so. It is not confusingly like the label for any other party and the Secretary of State has independent authority to exclude such confusing party

> names in any event. It is almost certainly more descriptive of Mr. Schrader's political beliefs than the labels "Natural Law" or "Reform" which belong to the two "qualified" minor parties in Ohio (See Affidavit of John Bender, attached to Doc. # 11).

Decision and Order, Doc. # 14.

Defendant's Supplemental Motion for Summary Judgment strongly argues that an independent candidate and a third-party candidate are very different and the State has different interests in regulating them. Defendant therefore argues that *Rosen* should not govern this case.

First of all, Defendant argues that Ohio Revised Code § 3505.03 serves an important interest in protecting the integrity of the election process which was violated in this case. Mr. Schrader circulated his petitions to obtain ballot access as a non-party candidate before he had been formally nominated by the Libertarian Party at its April, 1998, convention. Although he personally had modified the part-petitions to indicate that he was the Libertarian candidate, the State argues (1) his method of proceeding was misleading because he was not yet the Party candidate and (2) nothing would prevent some other candidate, under the Court's preliminary injunction rationale, from circulating petitions with no label at all and then insisting on a ballot designation which "best expressed his views" but which was discordant with the opinions of those who had nominated him.

The first of these objections does not speak to the ballot label issue at all, but to the content of nominating petitions. Nothing in this decision should be read to limit the authority of the State to control the content of petitions to assure they

are truthful. The State's assertion, however, that Mr. Schrader was not the Party's candidate when he circulated the petitions rings somewhat hollow in that Ohio does not have a legal test for when someone is the "official" candidate of a non-recognized party. By limiting the legal definition of political party as set forth above, Ohio has forsworn any attempt to regulate how minor or non-recognized parties nominate candidates.

The second objection is also not compelling. As the Sixth Circuit held in *Rosen*, the candidate has the right to a ballot "cue" for the voters and the voters have a correlative right to information, albeit abbreviated, about what the candidate stands for. The requirement that a candidate not nominated by a qualified party obtain ballot access by petition is designed to ensure that every candidate on the ballot has some minimum level of support, so that the ballot is of a manageable size. If the State is concerned about designations which are confusingly similar to others already on the ballot, the Secretary of State has independent authority to regulate that subject. Again, if the State is concerned that a candidate nominated by petition would by ballot designation claim to represent a non-qualified political party, it has ample means to prevent that (e.g., by recognizing a "minor party status" and giving its officers veto power over the use of the designation) without altogether preventing a petition-nominated candidate from giving any ballot cue, thereby invading his Equal Protection rights.

The State plainly has a valid interest, however, in limiting ballot access to parties which are qualified. *Anderson v. Celebrezze, 460 U.S. at 788;* see also *Timmons v. Twin Cities Area New Party, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589, 603 (1997).* Nothing in this

Decision should be read as casting doubt on the validity of Ohio Revised Code § 3517.01.

Accordingly, the Court concludes that denial of a ballot label or cue of the sort sought by Mr. Schrader to him or to others similarly situated denies their First and Fourteenth Amendment rights. Since the parties agree that Ohio Revised Code § 3505.03 is properly interpreted to require such a denial, the Court hereby declares the statute, as so interpreted, to be unconstitutional and therefore invalid.

The Clerk will enter final judgment in favor of the Plaintiffs and against the Defendants.

December 13, 1999.

/s/

Michael R. Merz

United States Magistrate Judge

Footnotes

[1] J. Kenneth Blackwell, Bob Taft's successor in office as Secretary of State, has been substituted as a party Defendant (Doc. # 27).

[2] Contrast the situation where a court is faced with cross-motions for summary judgment, without a stipulation that the case be decided on such motions, and may therefore find that there are genuine issues of material fact which prevent a judgment for either side. See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2920 at note 22.

00-3044

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES SCHRADER, ET AL.,
Plaintiffs-Appellees,

v.

J. KENNETH BLACKWELL, OHIO SECRETARY OF STATE,
Defendant-Appellant,
CLARK COUNTY BOARD OF ELECTIONS,
Defendant.

April 9, 2001, Filed

NOTICE:
DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Original Opinion of February 23, 2001, Reported at: *2001 U.S. App. LEXIS 2629.*

JUDGES:
BEFORE: DAUGHTREY and GILMAN, Circuit Judges; and HEYBURN, * District Judge.

* Hon. John G. Heyburn, II, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION:

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.